

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1065

COMMONWEALTH

vs.

JESSICA M. DEBONISE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a bench trial in the District Court, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor, in violation of G. L. c. 90, § 24 (1) (a) (1).<sup>1</sup> In this consolidated appeal from her conviction and the order denying her motion for new trial, the only issue raised for our consideration is whether the defendant was entitled to a new trial because her counsel provided her with ineffective assistance.<sup>2</sup> We affirm.

Discussion. The defendant argues that the motion judge, who was also the trial judge, erred because trial counsel was

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<sup>1</sup> The defendant was acquitted of negligent operation of a motor vehicle. She was also found responsible for the civil infraction of speeding.

<sup>2</sup> The defendant makes no separate argument with respect to her direct appeal.

ineffective for calling two police officers as witnesses who ultimately gave damaging testimony without providing any offsetting benefit. Specifically, the defendant argues that the officers' testimony that "they saw no signs of a head injury and that [the defendant] was intoxicated" gravely weakened her defense that she was not under the influence but rather exhibiting concussion-like symptoms from having been struck in the head by a beer bottle "less than an hour" earlier at a bar.

Motions for a new trial are committed to the sound discretion of the judge, Commonwealth v. Moore, 408 Mass. 117, 125 (1990), and "are granted only in extraordinary circumstances," Commonwealth v. Comita, 441 Mass. 86, 93 (2004). "Reversal for abuse of discretion is particularly rare where the judge acting on the motion was also the trial judge." Commonwealth v. Schand, 420 Mass. 783, 787 (1995). Where, as here, a motion for a new trial is based on ineffective assistance of counsel, the defendant must show that the behavior of counsel fell measurably below that of an ordinary, fallible lawyer and that such failing "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Tactical decisions of counsel, such as whether to call a witness, amount to ineffective assistance only if they were "manifestly unreasonable when made." Commonwealth v. Zagrodny, 443 Mass.

93, 102 (2004), quoting Commonwealth v. Martin, 427 Mass. 816, 822 (1998).

The defendant argues that her trial counsel could have pursued her concussion defense without calling the two police officers who gave damaging testimony as to her sobriety. Specifically, she points out that a Commonwealth witness testified that the defendant had stated to him that she had been hit in the head with a beer bottle. Additionally, the defendant's statement could have been corroborated on cross-examination of the same witness, who had knowledge that another woman had been booked the same night for the beer bottle assault on the defendant. Moreover, the defendant's medical records also supported her defense in that they showed she sought out treatment for head injury later that day.

There is no doubt that one reasonable tactical decision could have been to present no additional witnesses and simply rely on cross-examination and medical records. This strategy may have had the advantage of being safe, but it also may have had the disadvantage of being muted and therefore ineffectual. Another reasonable tactical decision was to strengthen the otherwise oblique defense by presenting affirmative evidence of the assault that the defendant had endured prior to being pulled over. The testimony of the officers added veracity to the defendant's otherwise self-serving report that she had been

struck in the head with a beer bottle. See Commonwealth v. Zorn, 66 Mass. App. Ct. 228, 236 (2006) ("police officers and other government officials involved in an investigation are presumed to be reliable and their information credible").

Although each police witness also gave an opinion that the defendant appeared to be intoxicated,<sup>3</sup> this was not inconsistent with the defendant's trial strategy. The defendant never claimed that she did not consume any alcohol. Rather, her position at trial was that her impairment was due to being hit on the head rather than to alcohol consumption. The decision whether to call witnesses to support this defense or to rely on cross-examination and medical records to argue the defense to the judge is a classic tactical decision that will not be second-guessed on appeal. See Zagrodny, 443 Mass. at 102. Accordingly, the judge did not err or otherwise abuse his

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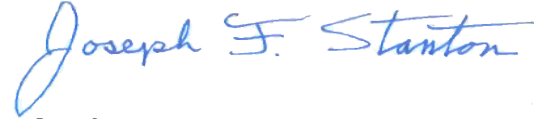
<sup>3</sup> The defendant also faults trial counsel for failing to blunt the force of these opinions by pointing out that the witnesses failed to note such opinions in their contemporaneous police reports. However, trial counsel may well have left the witness statements alone in order to avoid drawing additional emphasis to them.

considerable discretion in denying the motion for new trial.

Judgment affirmed.

Order denying motion for new  
trial affirmed.

By the Court (Rubin, Kinder &  
Singh, JJ.<sup>4</sup>),



Clerk

Entered: July 26, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.